

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHAN JOHN GAUSE,

Defendant-Appellant.

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UNPUBLISHED

April 22, 1997

No. 181723

Recorder's Court

LC No. 94-002833

Before: White, P.J., and Cavanagh and J. B. Bruff\*, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions for armed robbery, MCL 750.529; MSA 28.797, and unlawfully driving away a motor vehicle, MCL 750.413; MSA 28.645. Defendant was sentenced as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to 8 1/2 to 15 fifteen years' imprisonment. We affirm.

Defendant first argues that he was denied his right to due process and a fair trial when the trial court admitted identification evidence without an independent basis and when the identification was tainted by an unduly suggestive pretrial lineup. We disagree. The determination whether an identification procedure was improper or unduly suggestive is made in light of the totality of the circumstances. *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974); *People v McElhaney*, 215 Mich App 269, 287; 545 NW2d 18 (1996). This Court will not reverse a trial court's decision to admit identification evidence unless that decision was clearly erroneous. *McElhaney*, *supra* at 286. Having reviewed the totality of the circumstances, we conclude defendant has failed to establish that the pretrial lineup was impermissibly suggestive. Further, because there was no impropriety in the pretrial identification, there was no need to establish an independent basis for the in-court identification. *Id.* at 288.

Defendant next argues that there was insufficient evidence that he was armed at the time of the robbery. Again, we disagree. When reviewing a challenge based on the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a

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\* Circuit judge, sitting on the Court of Appeals by assignment.

rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995).

The elements of armed robbery are: (1) an assault, and (2) a felonious taking of property from the victim's person or presence, while (3) the defendant is armed with a weapon specified in the statute. *People v Johnson*, 215 Mich App 658, 671; 547 NW2d 65 (1996), lv gtd 453 Mich 900; 554 NW2d 321 (1996). "Conviction of armed robbery requires a finding that the defendant was armed either with a dangerous weapon or with an article used or fashioned in such a way as to lead a reasonable person to believe that it was a dangerous weapon at the time of the robbery." *People v Jolly*, 442 Mich 458, 465; 502 NW2d 177 (1993). There must be some objective evidence of the existence of a weapon, rather than the victim's mere subjective belief. *Id.* at 468-469. However, circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of a crime. *Id.* at 466.

In the instant case, the evidence showed that the complainant was loading groceries into her van when she was approached by defendant. The complainant testified that defendant poked her "with his hand or whatever was in his pocket" and demanded her keys. She thought defendant was "going to shoot [her] or something." She felt something hard hit her in the ribs and believed defendant had a gun. Although complainant did not actually see a gun, the evidence showed that defendant's hand was in his pocket and that complainant felt something poking her in her ribs. Based on these facts, a rational jury could have found that defendant had a weapon or an article used or fashioned in a way as to lead the victim to believe it was a dangerous weapon. There was sufficient objective evidence from which the jury could conclude that the "armed" element was proven beyond a reasonable doubt.

Next, defendant argues that he was denied his right to a fair trial when the prosecutor was allowed to question defendant about his postarrest, post-*Miranda*<sup>1</sup> warnings silence. Defendant did not object to the prosecutor's questions at trial. Therefore, appellate review is precluded unless a cautionary instruction could not have cured the prejudicial effect, or unless failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Dunham*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (No. 179779, issued 11/26/96, p 2). Upon review of the record, we conclude that the prosecutor's cross-examination was proper. Defendant's testimony created the impression that he was fully cooperative with the police, and that the police declined defendant's offer to lead them to potentially exculpatory evidence. Defendant opened the door to the prosecutor's questions. See, e.g., *People v Allen*, 201 Mich App 98; 505 NW2d 869 (1993); *People v Vanover*, 200 Mich App 498; 505 NW2d 21 (1993). Accordingly, we find no miscarriage of justice.

Defendant's final claim of error is that the trial court erred in refusing defendant's request for substitution of appointed counsel. We disagree. An indigent defendant may be entitled to substituted counsel upon a showing of good cause and where substitution would not disrupt the judicial proceedings. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). "What circumstances will show 'good cause' for substituting appointed counsel depends on the facts and circumstances of each case." *People v O'Brien*, 89 Mich App 704, 708; 282 NW2d 190 (1979). The decision with

regard to substitute counsel is within the trial court's discretion, and will be reversed on appeal only upon a showing of abuse of that discretion. *Id.*

Defendant alleges that he was entitled to new counsel because his attorney's refusal to question the witnesses on various issues caused defendant to lose confidence in his attorney's performance and a complete breakdown in communication. "A complete breakdown of the attorney-client relationship or disagreement over whether a particular line of defense should be pursued may justify appointing new counsel." *Id.* Upon review of the record, we conclude that "the problems in this case never reached that magnitude." *Id.* The trial court did not abuse its discretion in refusing to appoint substituted counsel.

In a supplemental brief, defendant argues that the trial court erred in refusing to grant a mistrial where one of the prospective jurors stated on voir dire that his wife was present at the scene during a robbery, which may have been this incident. We disagree. The prospective juror was excused through the exercise of a peremptory challenge. Defendant has not shown that the juror's comment tainted the jury. The issue was whether defendant had committed the robbery, not whether a robbery had occurred. The prospective juror's comment did not bear on this issue.

Affirmed.

/s/ Helene N. White  
/s/ Mark J. Cavanagh  
/s/ John B. Bruff

<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1996).